United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

To be argued by:
George H. Lowe
Syracuse, N. Y.
Estimated Time: 15 Minutes

Docket No. 74-1416

IN THE

United States Court of Appeals

For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Appellee,

—*vs*—

RAYMOND LEO COWLES,

Appellant.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA

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STATEMENT OF ISSUES

1. Whether the trial court erred in giving a supplemental charge after the jury indicated it was in disagreement.

2. Whether the trial court erred during the *voir dire* examination of prospective jurors by failing to ask certain questions proposed by Appellant.

3. Whether the trial court erred in failing to give verbatim Appellant's proposed jury instructions on eye-witness identification.

4. Whether the trial court erred in permitting testimony as to an admission made by Appellant when notice of such admission

had not been given to defense counsel prior to the commencement of trial.

STATEMENT OF THE CASE

On October 3, 1973, a four count Indictment was filed with the United States District Court for the Northern District of New York charging the Appellant and John Doe, a person whose name was unknown to the grand jurors, with violations of paragraphs (a), (b), and (d) of the Federal Bank Robbery Act, 18 U.S.C. § 2113, and of 18 U.S.C. § 2, and with conspiring with each other to violate the same Act, in violation of 18 U.S.C. § 371. The violations allegedly occurred on August 30, 1973. (A 1 of Appendix). 1/

On November 20 - 21, 1973, a hearing was held before Chief Judge James T. Foley on the Appellant's motion for suppression of certain eyewitness identification evidence. Following the denial of the motion 2/ the case immediately proceeded to trial.

The conspiracy count of the Indictment was dismissed by Chief Judge Foley when, at the conclusion of its case in chief, the Government joined in the Appellant's motion for dismissal. After receiving the case the jury was unable to reach a unanimous verdict and a mistrial was declared on November 28, 1973.

On February 4, 1974, a second trial on the remaining three counts of the Indictment commenced before Judge Lloyd F. MacMahon, sitting by designation, and a jury. In order to minimize possible confusion it was agreed between counsel and Judge MacMahon that only Count I of the Indictment, charging

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1/ The Appendix referred to is that of the Appellee, and the page references are to the original record transcript pages, except where, as here, the phrase "of Appendix" appears.

2/ With regard to the line-up conducted on September 13, 1973, Chief Judge Foley found: "What occurs [sic] there was an exemplary procedure and probably could be a model for this type of investigative line-up." (A 5 of Appendix).

a violation of 18 U.S.C. §§ 2113(a) and 2, would be presented to the jury for a verdict. (A 607) On February 12, 1974, the jury returned a verdict of guilty.

On March 29, 1974, the Appellant was sentenced to imprisonment for a period of ten years on Count I. Counts II and III then were dismissed on the Government's motion.

STATEMENT OF FACTS

On August 30, 1973, at approximately 10:30 to 10:45 a.m. (A 187), a single individual, wearing a bright orange parka with the hood up, having his face covered with a white material, and carrying a hand-gun, entered the Seaway Shopping Plaza branch of the Marine Midland Bank-Northern in Pamelia, New York. (A 20, 28-29) The deposits of this Bank were insured by the Federal Deposit Insurance Corporation. (A 49) Three female tellers were present in the Bank when the gunman entered; moments later a young boy, and subsequently a man and woman and their infant child, entered the Bank. (A 31-32)

The gunman vaulted the tellers' counter and, forcing one of the tellers to assist him, filled a bag with the Bank's cash. (A 29-31) At his orders the aforementioned Bank customers were standing in the lobby area. (A 32) The gunman then jumped back over the tellers' counter, exited the Bank through the front doors, and entered the passenger side of an automobile that was parked directly outside the doors. (A 34, 54, 115, 178) The gunman and the driver of the car then made their get-away, along with $36,640 of the Bank's monies. (A 49, 55-58, 115-121, 178)

There was no real dispute at the trial as to the aforementioned facts. (A 610, 540-541) The disputed issue was whether the Appellant was the driver of the get-away car. (Appellant's Brief, 2-3)

At the trial Jeffrey Potter, the aforementioned young boy (14 years old) who entered the Bank moments after the gunman did, made an in-court identification of Appellant as being the driver

of the get-away car. (A 171-181) Similarly, Donald and Jean Schultz, a married couple, each testified that from a laundromat window approximately 25 to 30 feet from the Bank they observed the gunman enter the get-away car, and they observed the driver from that point in time and while the car proceeded toward them, passing directly in front of them at a distance of about ten feet; Mr. and Mrs. Schultz each identified the Appellant in court as being the driver. (A 49-57; 111-121)

George Eiss' testimony indicated that he, as a customer, departed from the Bank moments before the gunman entered; in court Mr. Eiss identified the Appellant as sitting behind the wheel of a 1965 or 1966 blue Chevrolet Impala parked a short distance from the Bank, as he existed. (A 449-470) (The testimony of other witnesses established that the get-away car was a 1965 blue Chevrolet Impala. [A 297, 115, 179, 214, 534-538 of Appendix]).

Mrs. Charlotte Palmer identified the Appellant in court as the driver of a red convertible which she observed at approximately 10:45 a.m. on August 30, 1973, exiting from a parking lot where the 1965 blue Chevrolet Impala subsequently was discovered abandoned (A 532-544 of Appendix; 296-300); it was the Government's contention that the proof established that this red convertible was a switch car.

In addition to the aforementioned in-court identification of the Appellant by these five witnesses, all five selected the Appellant out of a line-up conducted on September 13, 1973, fourteen days after the bank robbery. (A 223-228) Prior to the line-up proceeding spreads of photographs were shown to three of the aforementioned five witnesses. Donald Schultz and Charlotte Palmer selected the Appellant's photograph. (A 309-312) Mrs. Jean Schultz selected the photograph of another individual as being "the closest", the "same type", but "he wasn't the driver". (A 62) According to the police officer who exhibited the photographs to Mrs. Schultz, she then selected a second photograph, that of the Appellant, and stated "This is possibly the subject." (A 305-307) Mrs. Schultz did not recall making a second selection. (A 85-86)

James Gaither testified that while he and the Appellant were incarcerated at the Oneida County Jail, following the declaration of the mistrial in the first trial, he asked the Appellant whether he was "really involved in the robbery", and the Appellant replied "Hell, yes, but I am not going to tell them that." (A 249-260) Gaither at the time had been incarcerated on charges arising out of a robbery at a different branch of the Marine Midland Bank; on December 28, 1973, he pleaded guilty to a violation of 18 U.S.C. § 2113(b). (A 250)

The defense consisted of an alleged alibi based primarily upon the testimony of two boys, fourteen and sixteen years of age. (A 343, 399) The boys, Wayne Prosser and John Johnson, asserted that the Appellant and "Stretch" Johnson, the brother of John, picked them up in an automobile at approximately 10:45 a.m. on the day of the robbery, and that these four drove to various places and were together at all times until 1:00 p.m. According to the alibi witnesses, while they were in the automobile with the Appellant they observed a police officer's car pass them with its siren on and lights flashing, and also while in the automobile they heard a radio announcement that the bank had just been robbed. (A 343-358, 399-413) Under cross-examination Prosser admitted that around the middle of September, 1973, approximately two weeks after the bank robbery, he had stated to an FBI Agent, two state police officers, and his school principal, that it was 12:00, not 10:45, when the Appellant and "Stretch" Johnson picked them up. (A 358-362)

Following the trial court's direction that the Government would be precluded from attempting to impeach the Appellant by reference to his prior felony conviction for robbery (A 484), the Appellant testified in his own behalf. Despite the Court's ruling the Appellant volunteered by implication that he had "a record." (A 507)

The Appellant's testimony corroborated that of the two alibi witnesses, the young boys. (A 485-492) On cross-examination, however, the Appellant admitted that on September 10, 1973, eleven days after the bank robbery, he told an FBI Agent that on

the morning of August 30, 1973, he was either at his grandmother's or his girlfriend's house (A 497); he made no mention to the Agent of being with Wayne Prosser, John Johnson, or "Stretch" Johnson on August 30. (A 516-520) By way of explanation the Appellant testified that he had not, as of the September 10, 1973, interview with the Agent, given any thought to where he had been on the morning of August 30, 1973. (A 497)

Although claiming he had not given the matter any thought, he admitted that prior to September 10 he had been told by his girl-friend that a composite drawing of the driver of the get-away car that had appeared in a local newspaper looked like him, that his sister had told him that police officers had been overheard referring to him as a possible suspect in the bank robbery, that he felt that if officials "can't find somebody else, they push it on somebody that's got a record," (A 507), and that, prior to the interview, the Agent stated, among other things, that he wished to discuss the bank robbery and that anything the Appellant said could be held against him. (A 495-500)

In rebuttal, the FBI Agent who had interviewed the Appellant on September 10 testified that during that interview the Appellant stated that since 1969 he had seen "Stretch" Johnson on only one occasion, while he was hitchhiking, when Johnson and one other white male picked him up and drove him to his father's home; on this occasion they were stopped by local police, questioned about guns being in the car, and released. (A 519-520)

ARGUMENT

POINT I

IT WAS NOT ERROR TO GIVE A SUPPLEMENTAL CHARGE AFTER THE JURY INDICATED IT WAS IN DISAGREEMENT.

1. The issue of the propriety of the supplemental charge was not preserved below and should not be considered on appeal.

Rule 30 of the Federal Rules of Criminal Procedure provides, in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Failure to comply with Rule 30 precludes a party from raising the point on appeal, unless it constitutes "plain error". *United States* v. *Chaplin*, 435 F.2d 320, 323 (2nd Cir. 1970) (failure to object to a supplemental *Allen* charge given to the jury after a reported impasse in their deliberations); Rule 52(b), Federal Rules of Criminal Procedure.

After receiving the case at 3:45 p.m., the jury reported to the court at 9:50 p.m. that they were in disagreement. The Court, in the presence of counsel and the defendant, informed the jurors that they would be sequestered for the night and return in the morning, stating "at which time I will give you further instructions and you will then resume your deliberations". (A 623-625)

Defense counsel might reasonably have anticipated what the "further instructions" would be, or at least inquired as to what the court intended to do. However, no action was taken, or objection made, either that night or the next morning before the supplemental charge was given, except to move for a mistrial on the ground that the jury was hung. Following the supplemental instructions, and before the jury again retired, defense counsel renewed his previous motion for a mistrial but made no objection

to the charge as given, nor did he request any additional cautionary language. (A 625, 628)

It is submitted that the Appellant's failure to object precludes him from asserting this issue on appeal. *United States* v. *Chaplin, supra; United States* v. *Bowles*, 428 F.2d 592, 597, ftn. 13 (2nd Cir. 1970). This is particularly true where, as in the instant case, it was not known whether the majority favored conviction or acquittal, and the failure to object could have been intentional:

> Failure to object may have been trial strategy. Had the supplemental charge broken the deadlock in favor of acquittal, such strategy might well have been evidence of astute judgment.

United States v. *Hynes*, 424 F.2d 754, 758 (2nd Cir. 1970), cert. den. 90 S.Ct. 2270 (1970).

Finally, for the reasons discussed below, the giving of the supplemental charge was not "error" at all, and, even if it were, the error should not be noticed under Rule 52(b) since it did not affect "the fundamental fairness of the trial" or the "integrity of judicial proceedings", nor did it inflict "serious injustice" upon the defendant. *United States* v. *Bryant*, 480 F.2d 785, 789, ftn. 3 (2nd Cir. 1973).

2. The "Allen" charge is not inherently prejudicial.

As this Court stated in *United States* v. *Hynes, supra*, at 757:

> This Court has consistently reaffirmed its approval of the supplementary charge to encourage a verdict in the face of an apparent deadlock. . . .Absent coercive circumstances outside the charge itself, we are satisfied that the so-called "Allen charge" does not unconstitutionally deprive a defendant of his right to a unanimous verdict rendered upon the conscientious consideration of twelve impartial jurors, notwithstanding the different view adopted within the last few months in two sister circuits . . . . The charge is no more than a re-statement of the precepts which the trial judge almost invariably gives to guide the jurors' deliberations in his original charge. Its function is to emphasize that a verdict is in the best interests of both

> prosecution and defense, and we adhere to the view that "[t]he considerable costs in money and time to both sides if a retrial is necessary certainly justify an instruction to the jury that if it is possible for them to reach a unanimous verdict without any juror yielding a conscientious conviction . . . , they should do so."

As recently as April 1, 1974, in *United States* v. *Zane*, 495 F.2d 683, 692 (2nd Cir. 1974), this Court has maintained the inherent propriety of the *Allen* charge: "[W]e have repeatedly affirmed the district court's use of the charge in appropriate circumstances . . . ."

In addition, only one federal court of appeals has held that the *Allen* charge is inherently coercive:

(a) The District of Columbia Court of Appeals has adopted the American Bar Association standard for treatment of the problem of deadlocked juries; it did not, however, hold that the *Allen* charge is *per se* coercive, but rather predicated its decision on the needs of judicial administration. *United States* v. *Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971).

(b) The First Circuit has explicitly declined to follow the District of Columbia Circuit's decision in *Thomas*, *supra*, and continues to approve of the use of the *Allen* charge where, as in the instant case, the jury has indicated its difficulties in agreeing, and where, as in the instant case, a judicially approved articulation of the charge is used. *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971).

(c) The Fourth Circuit, in *United States* v. *Rogers*, 289 F.2d 433, 435 (4th Cir. 1961), stated: "Had the charge approved in *Allen* been given here. there would be no open question of its propriety.

(d) The Fifth Circuit, convened *en banc* to consider the propriety of the *Allen* charge in *United States* v. *Bailey*, 480 F.2d 518 (5th Cir. 1973), adhered to its approval. It was in the earlier *panel* opinion that the Court made the statement quoted at page 18 of the Appellant's Brief that "the undisputable modern trend is to abandon *Allen*".

(e) The Sixth Circuit has stated, in *United States* v. *Harris*, 391 F.2d 348, 354 (6th Cir. 1968): "We have no criticism of the *Allen* charge as such." The Sixth Circuit clearly did not alter this approval in *Jones* v. *Norvell*, 472 F.2d 1185 (6th Cir., 1973), cited at page 18 of the Appellant's Brief, when it rejected a state trial court's non-*Allen* supplemental charge, given when the court knew the jury stood at eleven to one for conviction, and after which a guilty verdict was returned within five minutes.

(f) The Seventh Circuit, without finding the *Allen* charge *per se* coercive, but "in the interest of judicial economy and uniformity", has approved the ABA formulation of a supplemental charge. *United States* v. *Silvern*, 484 F.2d 879, 882 (7th Cir. 1973)

(g) The Eighth Circuit, in *United States* v. *Hodges*, 408 F.2d 543, 552 (8th Cir. 1969), stated: "We initially reject the claim that the *Allen* charge itself must be held today, some 70 years after the decision, to be coercive, prejudicial, and unconstitutional." Contrary to the implication at page 18 of the Appellant's Brief, the District Court's *Allen* charge in *Hodges*, *supra*, was not given in the initial instructions but rather as a supplemental charge after the jury had been deliberating for approximately three and one-half hours.

(h) The Ninth Circuit has "consistently upheld the giving of" the "pure" *Allen* charge. *Sullivan* v. *United States*, 414 F.2d 714, 717 (9th Cir. 1969).

(i) The Tenth Circuit has not found the *Allen* charge to be coercive *per se*, but rather "has made a case by case examination to determine whether the taint of coercion was present". *Munroe* v. *United States*, 424 F.2d 243, 246 (10th Cir. 1970). The Court in *Munroe*, *supra*, at 247, approved the use of a *supplemental* instruction (even though the jury had not indicated it was in disagreement and indeed had advised the trial judge that they were making progress and had reached verdicts on two of the three counts charged) even though in an earlier decision the Court had indicated that an "Allen" instruction should be

included in the main charge. See *United States* v. *Wynn*, 415 F.2d 135, 137 (10th Cir. 1969).[3/]

Thus, only the Third Circuit, in *United States* v. *Fioravanti*, 412 F.2d 407 (3rd Cir. 1969), has prohibited the use of the *Allen* charge. And even in *Fioravanti* the Court's decision in this respect was prospective only, and the conviction was affirmed.

It is submitted, therefore, that the overwhelming weight of authority is to the effect that the *Allen* charge is not inherently prejudicial. In addition, the only Circuit supporting the contrary view affirmed the underlying conviction and applied its ruling prospectively.

3. The Supplemental Charge as given was not improper

The jury began its deliberations at 3:45 p.m. on February 11, 1974. (A 623) At 9:50 p.m., following a dinner break of about two hours duration, the jury informed the court that they were in disagreement. The court advised the jury that they would be sequestered for the night and return the next morning for further instructions from him and to resume deliberations (A 623-625)

Following the supplemental charge the next morning, the jury retired to their deliberations at 10:15 a.m. At 11:08 a.m., at the jury's request, Mrs. Charlotte Palmer's testimony was read to them, after which they again resumed deliberations at 11:37 a.m. At 12:02 p.m. the jury announced that it had reached a verdict. (A 626-629)[4/]

3/ As quoted above at page 10, this Court in *United States* v. *Hynes*, *supra*, approved the use of a supplemental *Allen* charge but stated that "two sister circuits" had adopted a different view. One of those Circuits was the Tenth, whose opinion in *United States* v. *Wynn*, *supra*, was interpreted by this Court as "prospectively ruling that the charge could no longer be given . . . as a supplemental instruction to a deadlocked jury, but permitting its inclusion in the main charge." *United States* v. *Hynes*, *supra*, at 757. Apparently the Tenth Circuit is not applying *Wynn* quite so strictly.

4/ As is discussed above, at no time throughout this period did Appellant object in any way to the supplemental charge.

The supplemental charge as given by the trial court was the normal version of the *Allen* charge, i.e., it closely followed the charge described in *Allen* v. *United States*, 164 U.S. 492 (1896). (A 626-628) As was stated in *United States* v. *Domenech*, 476 F.2d 1229, 1231 (2nd Cir. 1973):

> This Court has consistently and recently upheld normal versions of the "Allen" instructions ... and we are of course bound by those rulings. There is no occasion to consider whether en banc reconsideration should not be had of this general area ... since appellant did not, at the trial, challenge the "Allen" charge as such, but only a single one of the trial judge's statements.5/

Appellant argues at page 11 of his Brief, however, that this Court has approved the *Allen* charge *only* where "additional cautionary statements" are added. It is respectfully submitted that the authorities cited by Appellant do not support this contention.

Some trial courts in giving a supplemental charge *have* made statements beyond those set forth by the Supreme Court in *Allen supra*.6/ Nowhere, however, has this Court stated that these additional statements are mandatory7/; instead this Court has merely noted the use of them. Significantly, the use of such

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5/ Judge MacMahon presided in the court below in *Domenech* as well, of course, as in the instant case. His disputed sentences in *Domenech* were not included in his supplemental charge here.

6/ This "use of compromising language outside the Supreme Court statement in *Allen*" can in itself be dangerous as a possible aggravating circumstance resulting in coerciveness beyond the *Allen* charge itself. *United States* v. *Hynes*, *supra*, at 757. See *United States* v. *Rao*, 394 F.2d 354, 356 (2nd Cir. 1968); *United States* v. *Bowles*, 428 F.2d 592 (2nd Cir. 1970).

7/ In *United States* v. *Kahaner*, 317 F.2d 459, 484, ftn. 18 (2nd Cir. 1963), the Court stated: "It is true that some of our colleagues in the Fifth Circuit have expressed in dicta or dissenting opinions doubt whether even the Allen charge *simpliciter* should ever be given ... . We respectfully disagree."

statements frequently has been noted where potentially aggravating circumstances existed (but which are not present in the instant case). See, e.g., *United States* v. *Jennings*, 471 F.2d 1310, 1313-1314 (2nd Cir., 1973), cert. den., 411 U.S. 935 (1973), and *United States* v. *Meyers*, 410 F.2d 693 (2nd Cir., 1969), cert. den., 396 U.S. 835 (1969) (the trial courts knew at the time of the supplemental charges that the jurors were split 11 to 1 in favor of conviction)[8/]; *United States* v. *Martinez*, 446 F.2d 118 (2nd Cir. 1971), cert. den., 404 U.S. 944 (1971) (trial court delivered supplemental charge even though there had been no indication from the jury that they were deadlocked and neither party had requested it); *United States* v. *Bowles*, 428 F.2d 354 (2nd Cir. 1970) (the supplemental instruction was *not* the "pure" *Allen* charge but rather an apparent extemporaneous statement by the trial court); *United States* v. *Rao*, 394 F.2d 354 (2nd Cir. 1968) (the supplemental instruction was *not* the "pure" *Allen* charge but went beyond it in one respect.

Although, as discussed above, the "pure" *Allen* charge has been found to be non-coercive and proper, the Appellant contends that in the context of this case coercion can be inferred. The Appellant objects, for example, to the timing of the supplemental charge. In a case such as the instant one, however, where the jury, having to resolve only one issue and to reach a verdict on a single count, reports that it is in disagreement after close to four hours of deliberation, the trial court clearly, in the exercise of its discretion, properly could determine that further instruction was required. As stated in *United States* v. *Hynes*, *supra*, at 758, where the jury had deliberated for two hours and fifty minutes before the supplemental charge was given:

> We do not attempt to draw fine lines or circumscribe the trial court's discretion by declaring an arbitrary minimum time limit for all trials regardless of their complexity. We conclude only that Judge Weinfeld, in the exercise of his

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8/ It is difficult to tell from the *Jennings* opinion precisely what the defendant there was objecting to; it is possible to infer that he was objecting to the fact that the trial court did *not* give a "pure" *Allen* charge.

> discretion, properly could have determined that after nearly three hours of deliberation on this straight-forward evidence, the jury was honestly deadlocked and further instruction was required.

See also, *United States* v. *Martinez*, *supra*, (three hours, twenty minutes); *United States* v. *Meyers*, *supra*, (two and one-half hours), *United States* v. *Bowles*, *supra*, ("several hours").

Similarly, the Appellant contends that coercion may be inferred from the fact that an earlier trial of this matter resulted in a hung jury. Significantly, in the two Fifth Circuit cases cited by the Appellant in support of this contention, the trial courts' uses of "pure" *Allen* charges were approved and the convictions were affirmed.[9/] Assuming *arguendo*, however, that the fact of the prior hung jury is indicative of a relatively close question of fact, this in no way affects the underlying rationale for the use of a supplemental charge: to emphasize that a verdict, if it can be conscientiously reached, is in the best interests of both prosecution and defense. *United States* v. *Hynes*, *supra*, at 757.

In this respect, with regard to the fact of the prior hung jury, it is noteworthy that in the trial before Judge MacMahon, although the jury voluntarily disclosed a 10 to 2 split, it was not known whether the majority favored conviction or acquittal. (A 628-629) In the first trial before Chief Judge Foley it never was known even what the vote was. Thus the indication that a relatively close issue of fact was present cut both ways: clearly the Appellant could reasonably have concluded that a supplemental charge might aid him gain an acquittal. Defense counsel's failure to object to the supplemental charge supports this inference.

9/ *United States* v. *Bailey*, 468 F.2d 652 (5th Cir. 1972) and *Thaggard* v. *United States*, 354 F.2d 735 (5th Cir. 1965). As discussed above, the Appellant's citation of *Bailey* is to a panel decision; the panel's affirmance, and the use of the Allen charge, subsequently were affirmed by the Court sitting *en banc*, in *United States* v. *Bailey*, 480 F.2d 518 (5th Cir. 1973).

In summary,[10/] the supplemental charge as given was the "normal" version which this Court has consistently and recently upheld. *United States* v. *Domenech, supra.* "The jury was 'properly instructed that each juror's vote must reflect his considered judgment as to how the case is to be decided'; no more is required." *United States* v. *Cassino,* 467 F.2d 610, 619 (2nd Cir. 1972). In addition, there were no aggravating circumstances to suggest any coerciveness beyond the supplemental charge itself. Indeed, the lack of coercion resulting from the supplemental charge is established by the fact that at its conclusion the jury deliberated further, had additional testimony read to it, again deliberated, and then, approximately two hours later, returned a verdict. (A 628-629) As stated in *United States* v. *Moore,* 429 F.2d 1305, 1307 (9th Cir. 1970):

> Moreover, the record indicates that the jury was not coerced by the instruction. The jury did not reach a verdict immediately after receiving the instruction. During its further deliberations, it asked to hear again, and did hear, the testimony of all the witnesses. Only after that did it retire for a second time and finally reached a verdict. Rather than submitting to "coercion", the jury discharged its duty in a conscientious and laudable fashion.

See also *Hodges* v. *United States, supra.; Webb* v. *United States,* 398 F.2d 727, 729 (5th Cir. 1968).

10/ At page 12 of his Brief, the Appellant summarily contends that by "read[ing] an additional sentence out of the [Allen] Court's actual opinion", the trial court committed error. No cases, including *Williams* v. *United States,* 338 F.2d 530 (D.C. Cir. 1964), cited by the Appellant, have been found which support this contention.

POINT II

THE TRIAL COURT DID NOT ERR DURING THE VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS BY FAILING TO ASK CERTAIN QUESTIONS PROPOSED BY APPELLANT.

At pages 19-20 of his Brief the Appellant refers to three questions which, "in substance," he had requested be asked of prospective jurors during the voir dire examination. In his preparation of this portion of his Brief the Appellant was hampered by the fact that the transcript of the voir dire had not been prepared by the court reporter, and in fact was not completed until August 5, 1974.

The transcript shows that only two of the three questions were requested by Appellant:

(a) "I would just want to ask the Jury that if it is our decision that the defendant not take the stand, if they would take that failure to take the stand as an inference of guilt or any inference at all."

(b) "My second question would be if the jury came to the conclusion that the prosecution had not proven the guilt of the defendant beyond a reasonable doubt, and a majority of the jurors believed otherwise, would the individual juror change his verdict because he or she was in the minority?" (A 22 of Appendix)

It is well established that "the trial judge has broad discretion in conducting the *voir dire.*" *United States* v. *Colabella*, 448 F.2d 1299, 1303 (2nd Cir. 1971). It is submitted that that discretion was not abused in the instant case.

With regard to proposed question (a) above, pertaining to possible inferences to be drawn if the Appellant failed to take the stand, this issue clearly is moot, since the Appellant in fact *did* testify following the Court's ruling that a prior felony conviction could not be used by the Government for impeachment purposes. (A 484) It is submitted that even if the Appellant had not taken the stand the refusal to pose the question would not

constitute an abuse of discretion in light of the court's willingness to include an instruction of this nature in the charge (A 22 of Appendix) and in light of the court's inquiry as to whether the jurors could accept and apply the principals of law that the "[defendant] is presumed to be innocent", and that "the Government is required to prove the defendant's guilt beyond a reasonable doubt, and that the defendant is not required to offer any proof of his innocence." (A 10 of Appendix.) In *United States* v. *Clarke*, 468 F.2d 890, 891 (5th Cir. 1972), the Court stated:

> A question appellant wanted asked of all prospective jurors was whether they would follow the law that no presumption of guilt may be drawn from the failure of the defendant to testify. The District Judge refused, because he did not know—and should not have to speculate—whether the defendant would eventually take the stand. When the defendant does not take the stand, enough protection in federal trials is provided by...giving the defendant a right to have the Court instruct the jury to disregard his failure to testify.

With regard to proposed question (b) above, pertaining to a juror "holding out":

> this Court has indicated that such questions were improper in view of a juror's right to change his mind and duty to reconsider his initial impressions, as well as the presumption that jurors will obey the court's instructions concerning reasonable doubt.

United States v. *Gillette*, 383 F.2d 843, 849 (2nd Cir. 1967). The trial court did inquire of the jurors: "Do any of you know of any reason why you couldn't . . . base your verdict on the law . . . as the Court instructs you in its charge to you at the conclusion of the case?" (A 16 of Appendix)

POINT III

IT WAS NOT ERROR TO FAIL TO GIVE VERBATIM APPELLANT'S PROPOSED JURY INSTRUCTIONS ON EYE-WITNESS IDENTIFICATION.

Where a requested jury instruction is not given, a defendant, in order to raise the issue on appeal, must comply with Rule 30 of the Federal Rules of Criminal Procedure, quoted in part above at page 9. *United States* v. *Barash*, 412 F.2d 26, 33 (2nd Cir., 1969); *United States* v. *Leach*, 427 F.2d 1107, 1113, ftn. 6 (1st Cir. 1970). It is submitted that the Appellant did not comply with the requirements of Rule 30, and that as a result the issue of whether it was error to fail to give verbatim a proposed jury instruction on eye-witness identification has not been preserved and should not be considered on appeal.

The trial court's charge to the jury was given on Monday, February 11, 1974. (A 531, 599) On the preceding Friday, February 8, 1974, the trial judge, in chambers, advised defense counsel:

> I will grant in substance your requests concerning identification testimony with modifications which take the argumentative nature out of it. I will pose the factors that the Jury should consider along the lines that you request. (A 529)

Thus defense counsel was placed on notice that his requested instruction would not be given verbatim, yet he noted no objection either at the conference in chambers or on Monday before the charge commenced. (A 529-530, 532-534) In addition, and most importantly, at the conclusion of the charge, and before the jury retired, when the trial court inquired as to exceptions, defense counsel stated "I have one," and then excepted to an aspect of the charge on false exculpatory statements.11/ (A 623)

11/ Based upon the comparison, *infra* at page 23, of the Appellant's proposed instructions as opposed to the charge as given, it is not surprising that defense counsel had no objection.

Having failed to comply with Rule 30, and thereby failing to provide the trial court with an opportunity to cure any alleged error, the Appellant may not raise this issue on appeal unless the failure to give the requested instruction constitutes "plain error". Rule 52(b) of the Federal Rules of Criminal Procedure. It is submitted that, for the reasons discussed below, the failure was not "error" at all, and even if it were, it should not be "noticed" as "plain error". *United States* v. *Bryant, supra,* at 789, ftn. 3.

Initially, it is axiomatic that "[i]f a charge is substantially accurate, it is not error for the trial judge to refuse to use the language submitted by counsel." *United States* v. *Sacco,* 436 F.2d 780, 783 (2nd Cir. 1971). Secondly, it is submitted that, under the circumstances of the instant case, a "Barber" charge, "admonish[ing]. . .that the witness' testimony as to identity must be received with caution and scrutinized with care", would not be required even in the Third Circuit. *United States* v. *Barber,* 442 F.2d 517, 528 (3rd Cir. 1971). Under *Barber* the aforementioned charge is to given only if certain conditions in the eye-witnesses testimony have not been met; in the instant case, (1) the witnesses had the opportunity to observe the Appellant; (2) they were positive in their identifications; (3) each witness had selected the Appellant out of a line-up; (4) after cross-examination their testimony remained positive and unqualified.

Finally, in *United States* v. *Evans,* 484 F.2d 1178 (2nd Cir., 1973), this Court rejected the *Barber* approach and held that a specific charge on the dangers of eyewitness identification need not be given. Under *Evans, supra,* at 1188, the issue is whether there was afforded a full opportunity to develop all the facts relevant to identification and whether the instructions to the jury were careful and accurate. It is submitted that in the instant case these criteria were fully met.

In his examination of the eye-witnesses, defense counsel, aided by having in his possession the transcripts of their testimony in the first trial and at the suppression hearing, exhaustively and ably probed their perceptions, their opportunities to observe, and

discrepancies in description. Defense counsel's effective summation dealt almost exclusively with these issues and the dangers of misidentification. (A 538-568) In addition, and most importantly, unlike the trial judge in *Evans, supra,* at 1187, where the charge was limited to the general issue of credibility, Judge MacMahon carefully, accurately, and explicitly instructed the jury with respect to the eye-witness identifications. (A 615-617) In particular, comparing the Appellant's proposed instruction to the charge as given:

Proposed Instruction (A 463 of Appendix)	Charge (A 615-617)
(1) "[eyewitness] testimony should be received with caution."	(1) "[It is] your duty to consider the witnesses testimony carefully, and to reject the identification if you find that it is not reliable."
(2) "An identification by a stranger is not as trustworthy as an identification by an acquaintance."	(2) "You should look into the relationship of the witness and the person observed. For example, if you know someone it is easy to recognize them, but if they are strangers then it is not so easy. So you ask yourself did these witnesses know the driver of this car or where. . .or were the witnesses strangers."
(3) "Mistaken identification is not uncommon."	(3) Not given.

Proposed Instruction (A 463 of Appendix)	Charge (A 615-617)
(4) "The witness' opportunity to observe the perpetrator during the commission of the act charged is of great importance in determining the credibility of his identification."	(4) "The opportunity of a witness to observe the driver of the car at the time of the incident is of very great importance in determining the reliability of the witnesses' identification. You should therefore consider all of the circumstances shown in the evidence which bear on the ability, the opportunity, and the motivation of the witness to make a careful observation and to form and retain a definite image of the driver in his mind. You should thus consider such factors as. . . ." The Court then made a detailed statement of possible factors to consider.
(5) "The testimony of the witness that he is positive of his identification may be considered by you, but does not relieve you of the duty to carefully consider his identification testimony and to reject it if you find that it is not reliable."	(5) "Each of these witnesses was positive of his identification of the defendant as the driver. That testimony should be considered by you, but it does not relieve you of your duty to consider the witnesses testimony carefully, and to reject the identification if you find that it is not reliable."
(6) "Careful scrutiny of such testimony is especially important when, as in this case, it is the only testimony offered by the prosecution to connect the defendant with the act charged."	(6) Not given; however, the Government offered more than eye-witness testimony: James Gaither testified that the appellant admitted the act charged (A 249-260), and there was testimony as to false exculpatory statements made by appellant. (A 495-507; 519-520).

In summary, the proposed instruction in effect was given, and "full opportunity [was] afforded to develop all the facts relevant to identification of the defendant and [there were] careful and accurate instructions to the jury". *United States* v. *Evans*, *supra*, at 1188.

POINT IV

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY AS TO AN ADMISSION MADE BY APPELLANT WHEN NOTICE OF SUCH ADMISSION HAD NOT BEEN GIVEN TO DEFENSE COUNSEL PRIOR TO THE COMMENCEMENT OF TRIAL.

James Gaither testified that, while in federal custody on an unrelated bank robbery charge, he met the Appellant. According to Gaither, while he and the Appellant were incarcerated at the Oneida County Jail, following the declaration of the mistrial in the first trial, he asked the Appellant whether he was "really involved in the robbery", and the Appellant replied, "Hell, yes, but I am not going to tell them that." (A 249-260) The Government learned of Appellant's admission on December 28, 1973. (A 261) Defense counsel was advised of the admission on February 6, 1974, the third day of trial. (A 162-163) The Appellant contends that it was error to permit Gaither's testimony as to this admission since defense counsel had not been given notice of it prior to trial.

The office of the United States Attorney, and particularly the undersigned, do not wish to become involved in a personal dispute with Appellant's counsel, who is held in the very highest regard. Nevertheless, it was the Government's understanding that Rule 16 material would be given to counsel without the necessity of a motion, but nevertheless upon request; a formal motion would become necessary only if the Government concluded that certain requested material was irrelevant or otherwise not discoverable. (Indeed, in the Northern District of New York there is a long-standing rule of the district judges that

formal pre-trial discovery motions may not be filed until an informal demand has been made upon, and refused by, the United States Attorney). The materials that were provided to Appellant's counsel were done so pursuant to his request.

Despite the foregoing, the Government concedes that it would have been better practice to have given defense counsel additional notice of the admission. It is not conceded, however, that the Appellant thereby was in any way prejudiced.

Appellant was advised of Gaither's expected testimony on the morning of February 6, the day before he actually testified. (A 162-163, 247-249) On the 6th the Government provided Appellant with its file on Gaither, permitted defense counsel to interview the witness, and provided a copy of his "rap sheet". (A 218-219, 248) The trial court repeatedly made clear that it would do whatever was requested by defense counsel so that a thorough investigation of Gaither could be carried out.[12/]

12/ The following colloquy occurred on the morning of February 6:

> THE COURT: How much time do you need to investigate it?
>
> MR. CLARY: Well, of course it is going to be kind of difficult for me to do it while I am in trial.
>
> THE COURT: We could take a day off from the trial.
>
> MR. CLARY: Well —
>
> THE COURT: I was thinking if we could get through today, we would then take a day off. I don't see what else we could do. The Government is certainly entitled to put that evidence in.
>
> MR. CLARY: My only problem is that while I am here in trial I certainly can't do the investigation, so that would be agreeable.

Footnote 12, cont'd.

THE COURT: We would take a day off from the trial, and if you have got other witnesses we can use most of the day, we have got the Jury in, and tomorrow I will tell them just not to come and give you a day to investigate it. Do you think you could investigate it in a day?

MR. CLARY: I think I could. I would assume that I could. I don't know what I am going to find.

. . .

THE COURT: . . . . Why don't we leave it this way, you give Mr. Clary the Government's file on this witness. All right?

MR. LOWE: Yes sir.

THE COURT: You look it over, we will make the witness available to you sometime today for you to interview him as soon as you have had an opportunity to look that file over, and then you tell me what you want, whether you want a day to investigate it or whether you are content to rest on the file.

MR. CLARY: All right.

THE COURT: Is that fair enough?

MR. CLARY: Fair enough.

THE COURT: Now let's see, what would be the best way to work that. Could we take a long lunch hour, would that do it?

MR. CLARY: The lunch hour we have been taking would be ample. I don't know how big the file is.

THE COURT: It will give you a chance to talk it over with your client. We will recess today at, say 12:30, and we will resume at, say 2:30 or thereabouts. That will give you a chance to read the file, to talk with your client and to talk with this witness.

Will you make this witness available for Mr. Clary?

MR. LOWE: Certainly. He is in the building right now.

THE COURT: And then he can let me know at 2:30 what if anything you want to do further in the way of investigation.

(A 165-168)

Footnote 12, cont'd.

Following the luncheon recess on February 6:

> THE COURT: If there is anything you think — do you want more time? I will give you as much time as you need until you definitely made up your mind that you want to investigate or that you don't.
>
> MR. CLARY: I can't here think of — I can't think of anything else that I would be able to come up with at this point of the trial.
>
> THE COURT: We can suspend this trial.
>
> MR. CLARY: I understand that.
>
> THE COURT: I will suspend it until Monday if need be so you can investigate it the way you think you should. At least we can keep this witness off the stand until then if you want to investigate him or if your client has given you any leads.
>
> MR. CLARY: I don't really think that this would benefit me. I think the delay would be harmful in itself.
>
> THE COURT: I won't delay the trial, we will keeping [sic] going, just keep this witness off.
>
> MR. CLARY: If possible I would like to have a sheet on his record, if the FBI is in possession of any.
>
> THE COURT: Do you have the wrap sheet?
>
> MR. LOWE: I don't have one in my file.
>
> THE COURT: Does your office have one?
>
> MR. CLARY: The United States Attorney?
>
> MR. LOWE: The United States Attorney's Office does not. I imagine the FBI would, and I could have someone check that right now.
>
> THE COURT: Keep him off the stand at this point until you see if he has a criminal record, so he can use it to impeach him, and if you want to investigate further you let me know.
> (A 220-221)

At the conclusion of the afternoon session on February 6:

> THE COURT: Do you have any idea how long it will take to get the record of the man?

Footnote 12, cont'd.

MR. LOWE: I suspect I can have it this afternoon, the rap sheet.

THE COURT: And have you decided whether you want to do any further investigating?

MR. CLARY: I would assume after I receive that I don't have anything else that I can really investigate that I know about.

THE COURT: Your client is able to give you any leads to track down —

MR. CLARY: No, not really.

THE COURT: Well, you get the rap sheet and be sure that Mr. Clary sees it before we start tomorrow, and unless you have something further to bring to my attention that you want to investigate I am going to let the witness testify.

MR. CLARY: Yes.

THE COURT: If you advise me before the taking — before he takes the stand and I will give you a reasonable time to ferret out —

MR. CLARY: This would give me some time, I was rather rushed over the noontime.

THE COURT: I don't want to rush you. We will take tomorrow off if you feel it would be helpful to you in investigating this.

MR. CLARY: O.K.
(A 244-245)

On the morning of February 7, immediately before Gaither testified:

THE COURT: Mr. Clary, have you been provided with the report on the witness the Government intends to call?

MR. CLARY: Yes I have, Your Honor.

THE COURT: Do you require any further information?

MR. CLARY: No, Your Honor, nothing that I can think of.

THE COURT: Any further investigation?

MR. CLARY: I don't believe so, Your Honor.

THE COURT: All right.
(A 248)

Having been provided with the foregoing, and after Gaither's testimony was deferred for a day to permit Appellant to investigate and prepare for it, defense counsel stated that he did not require any further information or investigation. (A 248) Significantly, even now on appeal Appellant is unable to state what additional information he would have attempted to discover if given earlier notice of the admission, except whether Gaither was a police informant "deliberately placed by prosecution in proximity to defendant in order to get admissions or confessions". Appellant's Brief, page 28.

The Government categorically states that this was not the case. Indeed, Gaither's relationship with the prosecution was fully developed in his direct testimony (A 260-262) and on cross-examination. (A 282, 286-287) It was established that Gaither had had no contact with any Government representative regarding Appellant until after the admission had been made. Gaither then asked his attorney to contact the United States Attorney.

Thus, even assuming that the better practice would have been to give defense counsel additional notice of the admission, it is respectfully submitted that no prejudice to the Appellant resulted.

CONCLUSION

THE VERDICT AND JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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Form No. USA-20
(Rev. 10-9-58)

CERTIFICATE OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the Northern District of New York and is a person of such age and discretion as to be competent to serve papers.

That on August 23, 1974 he served a copy of the attached

BRIEF FOR APPELLEE (2 copies)

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Federal P.O. Bldg.,Syracuse,N.Y.

Addressee(s): Lee Clary, Esq.
316 Sherman Street
Watertown, New York

Patricia M. McCraith
Patricia M. McCraith

Sworn to before me this
23rd day of August, 1974.

Richard K. Hughes

RICHARD K. HUGHES
Notary Public in the State of New York
Qualified in Onondaga County
My Commission Expires March 30, 19 75